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Supreme Court of the United States

OCTOBER TERM, 190[illegible] No. [illegible] Or

O. T. 190

THE STATE OF GEORGIA, BY ITS ATTORNEY GENERAL, JOHN C. HART, *Plaintiff*

vs.

THE TENNESSEE C[illegible]PER COMPANY, AND THE DUCKTOWN SU[illegible]PHUR, COPPER & IRON COMPANY, LIMITED, *Defendants*

BRIEF AND ARGUMENT FOR THE TENNESSEE COPPER COMPANY IN SUPPORT OF ITS DEMURRER.

HOWARD CORNICK,
JOHN H. FRANTZ,
Attorneys for Tennessee Copper Company.

S. B. NEWMAN & CO., KNOXVILLE.

No. 13

ORIGINAL CAUSE

IN EQUITY

THE STATE OF GEORGIA, BY ITS ATTORNEY GENERAL JOHN C. HART, Plaintiff,

vs.

THE TENNESSEE COPPER COMPANY

AND

THE DUCKTOWN SULPHUR, COPPER & IRON COMPANY (LIMITED), Defendants

BRIEF OF THE DEFENDANT TENNESSEE COPPER COMPANY ON ITS DEMURRER TO THE ORIGINAL BILL.

STATEMENT OF THE CASE.

May it please your Honors:

The original bill in this cause is filed by the State of Georgia against the Tennessee Copper Company and against the Ducktown Sulphur, Copper & Iron Company, Limited, seeking to restrain by injunction the operations of the defendant companies, which are alleged to be engaged in mining, roasting, reducing, smelting copper ores, and manufacturing copper in Polk County, Tennessee. It is alleged in the bill that the fumes and gases given off from the plants of these two defendants are injuring the property of the citizens of Georgia residing in the Counties of Murray, Gilmer, Fannin, Union and

Towns. The injury complained of is: that the sulphurous fumes from these reduction works destroy vegetation and crops belonging to certain citizens in the counties above named.

The allegation of injury to the State of Georgia is that when this vegetation is thus killed by sulphur fumes, the lands in the affected territory wash more easily and therefore gullies, holes and ruts are washed in the public roads of the State of Georgia. The allegation on this point is as follows:

> "By the freshets and floods and the washing of the soil and levees, and the gullies, holes and ruts and other injuries occasioned thereby, your orator's roads and highways are greatly damaged and rendered unsafe, dangerous and inconvenient, etc."
>
> **Bill, p. 5.**

It is also alleged that the injury to the lands of the citizens of Georgia reduces the taxable value of the same, thus lessening the public revenues of the State of Georgia.

Bill, p. 6.

It will thus be seen that the State of Georgia seeks to establish such interest in the controversy as to entitle her to bring this suit upon two theories: 1st, in her own right, because of the alleged injury to public roads, and because of the alleged injury to public revenues by the reduction of taxable values; and 2nd, as **parens patriae**, trustee, guardian, and representative of its citizens, and on their behalf.

The defendant Tennessee Copper Company has filed its separate demurrer to the bill on the following grounds:

"First: That this Court has no jurisdiction of either the parties to or the subject matter of this suit, **because** it appears upon the face of said bill of complaint that the matters complained of, as set forth therein, do not constitute, within the meaning of the Constitution of the United States, any controversy between the State of Georgia and the defendants herein.

"Second: **Because** said bill shows upon its face that this suit is in reality for and on behalf of certain individuals who reside in the State of Georgia, and in the Counties of Murray, Gilmer, Fannin, and Towns, of said State, and that, although said suit is attempted to be prosecuted in the name of the State of Georgia, said State is in fact lending its name to said individuals and is only a nominal party to said suit, and that the real parties in interest are the said private citizens and persons residing in said state and counties.

"Third: That to the extent that the State of Georgia seeks relief based upon the alleged injuries and damages to her citizens and their property by the operations of defendants, no sufficient reasons are shown authorizing the State of Georgia to assume to act as '**parens patriae**, trustee, guardian or representative' for such citizens.

"Fourth: **Because** it appears from the face of said bill that the State of Georgia in her right of sovereignty is seeking to maintain this suit for the redress of the supposed wrongs of certain private citizens and residents of said state, while, under the Constitution of the United States and the laws enacted thereunder, said state possesses no such sovereignty as empowers it to bring an original suit in this court for such purposes.

"Fifth: **Because** it appears upon the face of said bill of complaint that no property rights of the State of Georgia are in any manner affected by the matters alleged in said bill of complaint, nor is there such property right involved in this suit as would give this court original jurisdiction of this cause.

"Sixth: In order to authorize this court to maintain original jurisdiction of this suit as against either of these defendants, it must appear that the controversy set forth in the bill of complaint and to be determined by this court is a controversy arising directly between the State of Georgia and de-

fendants; **whereas** the bill of complaint shows upon its face that there is no controversy directly arising as between the State of Georgia and defendants, but at most a controversy in which the State of Georgia has a remote and contingent interest.

"Seventh: **Because** said bill, although showing on its face that it is in reality brought to redress the supposed wrongs of certain individuals of said counties in the State of Georgia, fails to show that said individuals thus alleged to be wronged have no adequate remedy in the courts of Tennessee, or of the United States, but, on the other hand, shows that said citizens have and are pursuing successfully in the court of Tennessee a full, adequate and complete remedy at law for their supposed wrongs and injuries.

"Eighth: **Because** said bill fails to show such a statement of facts as to entitle the plaintiff to an injunction in this cause. It fails to show such a statement of facts as would or could work irreparable injury to the plaintiff, and shows no reason why full, adequate and complete relief can not be had in courts of law.

"Ninth: Said bill is in other respects uncertain, informal and insufficient, and does not state facts sufficient to entitle the State of Georgia to the equitable relief prayed for."

BRIEF AND ARGUMENT.

The questions raised by said Demurrer will be discussed under three heads:

First: The State of Georgia in her bill of complaint shows no such direct interest in this controversy as entitles her, under the Constitution of the United States, to maintain this action to redress supposed wrongs done to her domain.

Second: The State of Georgia in her bill shows no such state of facts as to entitle her to maintain this suit in her sovereign capacity as **parens patriae**, trustee, guardian, or representative of its citizens.

Third: The bill of complaint shows no such state of facts as would entitle the State of Georgia to the equitable relief sought in the bill.

We will discuss these three propositions separately although in a measure they may depend one upon the other.

POINT 1.

Is there a controversy, within the meaning of the Constitution of the United States, arising directly between the State of Georgia and these defendants?

As we view it, there is not.

The threatened reduction in taxable values does not create any direct interest in the controversy, but at most a remote and contingent interest.

The power of taxation is incident of sovereignty and not a property right.

Cooley on Taxation, 3rd Ed., p. 7.
McCulloch vs. Maryland, 4 Wheat, 316-428.
Bank vs. Billings, 4 Peters, 514.
Case of State Freight Tax, 15 Wall., 278.

It is not contended in the bill that the defendants are interfering with the **power of taxation as such,** the position being merely that because the property of certain citizens of Georgia is being injured that the taxable value of said property is being reduced, and that therefore the public revenues of the State of Georgia, derived from taxing said property, will be reduced.

If this proposition be correct as a matter of law, then the State of Georgia might in her own courts enjoin any conduct on the part of her citizens that would tend to reduce the value of property within her borders, as for instance, cutting timber or removing minerals from the ground, or the removal of property from her territory because of the theatened diminution of her income.

The injury to the public highways of the State of Georgia is a remote and consequential injury, and even this injury as alleged is very remote and trivial. The State of Georgia has no proprietary interest in such highways. It is true that she, to a limited extent, exercises sovereignty over them, but that is not such interest as is necessary to maintain a bill for injury to her property.

The property right in the roads is in the abutting owners.

The easement of use is in the public.

The duty of keeping in repair is in the counties and municipalities through which the highways run.

Upon the question of the character of interest required in the State to entitle it to maintain an original action in this court, this court as early as 1799, in the case of **Fowler vs. Lindsey, 3 Dallas, 411,** said:

> "A case which belongs to the jurisdiction of the Supreme Court on account of an interest that a state has in the controversy, must be a case in which the state is either nominally or substantially a party. It is not sufficient that a state may be consequentially

affected, for in such case, as where the grants of different states are brought into litigation, the Circuit Court has clearly a jurisdiction, and this remark furnishes an answer to the suggestions that have been founded on the remote interest of the state in making retribution to her grantees, upon the event of an eviction."

The language of this court in **Pennsylvania vs. Wheeler Bridge Co., 13 Howard, 557,** is peculiarly applicable. The court said:

"In this case the State of Pennsylvania is not a party in virtue of its sovereignty. It does not come here to protect the rights of its citizens. The sovereign powers of a state are adequate to the protection of its own citizens, and no other jurisdiction can be exercised over them or in their behalf, except in a few specified cases; nor can the state prosecute this suit on the ground of any remote or contingent interest in itself. It assumes and claims not an abstract right but a direct interest in the controversy, and that the power of this court can redress its wrongs and save it from irreparable injury. If such a case be made out, the jurisdiction may be sustained.

"When a state enters into a co-partnership or becomes a stockholder in a bank, or other corporation, its sovereignty is not involved in the business, but it stands and is treated as other stockholders or partners; and so in the present case the rights asserted and relief prayed are considered as in no respect different from those of individuals. From the dignity of the State the Constitution gives to it the right to bring an original suit in this court, and this is the only privilege, if the right be established, which the State of Pennsylvania can claim in the present case."

In other words, in order to prosecute an original suit in the Supreme Court, a state must show just such interest in the

controversy in question as an individual must show in order to maintain a suit in a proper jurisdiction, and that it is the dignity of the state rather than the character of the controversy which entitles it to come into this court by original proceeding.

The case of **New Hampshire vs. Louisiana, 108 U. S., pp. 76 et seq.,** is also in point, and will be referred to more fully hereafter in the discussion under the second head of this brief. In this case it was held that the state is not entitled in an original proceeding in this court to prosecute claims of its citizens against another state.

In the case of **Wisconsin vs. Pelican Insurance Co., 127 U. S., p. 289,** this court used this language:

> "As to 'controversies between a state and citizens of another state' the object of vesting in the courts of the United States jurisdiction of suits by one state against the citizens of another was to enable such controversies to be determined by a national tribunal and thereby to avoid the partiality, or suspicion of partiality, which might exist if the plaintiff state were compelled to resort to the courts of the state of which the defendants were citizens. **(Federalist No. 80, Chief Justice Jay in Chisholm vs. Ga., 2 Dall., 419-475; Story on the Constitution, Sec. 1638-1682.)** The grant is of 'judicial power' and was not intended to confer upon the courts of the United States jurisdiction of a suit or prosecution by the one state of such a nature that it could not on the settled principles of public and international law be entertained by the judiciary of the other state at all."

We think that this language conclusively establishes the correctness of the contention that the purpose of the provision of the Constitution under discussion was simply to allow the state to select this forum by virtue of its dignity as a state, and to prosecute suits here instead of being compelled to prosecute same in the state of the residence of the parties defendant.

As stated by Mr. Chief Justice Marshall in **Cohens vs. Virginia, 6 Wheat, 264,** in discussing this question:

> "In one description of cases, the jurisdiction of the court is founded entirely on the character of the parties, and the nature of the controversy is not contemplated by the Constitution. The character of the parties is everything, the nature of the case nothing."

The case of **Louisiana vs. Texas, 176 U. S., pp. 1 et seq.,** is peculiarly in point. This court said: **(Page 16.)**

> "In order then to maintain jurisdiction of this bill of complaint as against the State of Texas, it must appear that the controversy to be determined is a controversy arising directly between the State of Louisiana and the State of Texas, and not a controversy in the vindication of grievances of particular individuals."

The court further says **(page 22)**:

> "But in order that a controversy between states justiciable in this court can be held to exist, something more must be put forward than that the citizens of one state are injured by the mal-administration of the laws of another. The states can not make war or enter into treaties, though they may with the consent of Congress make compacts and agreements. When there is no agreement whose breach might create it, a controversy between states does not arise unless the action complained of is state action and acts of state officers in abuse or excess of their powers can not be laid hold of as in themselves committing one state to a distinct collision with a sister state."

Further the court said:

> "The word 'controversies' in the clauses extending the judicial powers of the United States to 'controversies between two or more states' and to 'con-

troveries between a state and citizen of another state' and the word **'party'** in the clause declaring that this court shall have original jurisdiction of all cases in which a 'state shall be a party' refer to controversies or cases that are justiciable as between the parties thereto, and not to controversies or cases that do not involve either the property or powers of the state which complains in its sovereign or corporate capacity that its people are injuriously affected in their rights by the legislation of another state. The citizens of the plaintiff state may in proper cases, invoke judicial protection of their property or rights when assailed by the laws and authorities of another state, but their state can not even with their consent make their case its case and compel the offending state and its authorities to appear as defendants in an action brought in this court. If this be not so, we were wrong in **New Hampshire vs. Louisiana, 108 United States, page 76,** in which case it was held that one state could not by taking charge of demands or debts held by its citizens against another state acquire the right to bring a suit in its name in this court against the debtor state."

POINT 2.

Does the State of Georgia allege such a state of facts as would entitle her to prosecute this suit as parens patriae, trustee, guardian, or representative of her citizens?

We think it does not.

As was said by this court in **Wisconsin vs. Insurance Co., 127 U. S., p. 265:**

> "The grant is of 'judicial power' and was not intended to confer upon the courts of the United States jurisdiction of a suit or prosecution by the one state of such nature that it could not under principles of public and international law be entertained by the judiciary of the other state at all." **(Page 289).**

In other words, a grant is not of some special power or privilege, but the privilege of **enforcing certain rights as a litigant in this court.**

The language of this court in **New Hampshire vs. Louisiana, 108 U. S., p. 76,** is very pertinent:

> "But it is said that even if a state as sovereign trustee for its citizens, did surrender to the national government its power of prosecuting the claims of its citizens against another state by force, it got in lieu the constitutional right of suit in the national courts. There is no principle of international law which makes it the duty of one nation to assume the collection of the claims of its citizens against another nation, if the citizens themselves have ample means of redress without the intervention of their government. Indeed Sir Robert Phillimore says, in his **Commentaries on International Law, Vol. II, 2nd Ed., page 12**: 'As a general rule the proposition of Martens seems to be correct, that the foreigner can only claim to be put on the same footing as the native creditor of the state.' Whether this be in all respects true or not, it is clear that no nation ought to interfere, except under very extraordinary circumstances, if the citizens can themselves employ the identical and only remedy open to the government if it takes on itself the burden of prosecution. Under the Constitution, as it was originally construed, a citizen of one state could sue another state in the courts of the United States for himself and obtain the same relief his state could get for him if it should sue. Certainly when he can sue for himself there is no necessity for power in his state to sue in his behalf, and we can not believe it was the intention of the framers of the Constitution to allow both remedies in such a case."
>
> **(Pages 90-91.)**

The court further held that the amendment taking away

the right of the citizen to sue another state in this court gave him no additional rights, saying:

> "Nothing was added to the Constitution by what was thus done. No power taken away by the grant of the special remedy was restored by the amendment."

The above quotation states in much clearer language than we could put it ourselves one of our positions with reference to this matter: that is, that in no case would a state in its sovereign capacity be permitted to prosecute a suit as **parens patriae,** trustee, guardian, or representative of her citizens, in this court, when such citizens have full, adequate and complete remedy in another forum, and might prosecute such claims for themselves.

Another pre-requisite is that the entire body of the citizens of the complaining state should be affected.

In **Louisiana vs. Texas, supra,** in the opinion of Mr. Justice Harlan, it is stated **(page 24)**:

> "But I am of the opinion that the State of Louisiana in its sovereign or corporate capacity can not bring any action in this court on account of the matters set forth in its bill. * * * Citizens of the complainant state may, in proper cases, invoke judicial protection of their property or rights when assailed by the laws and authorities of another state; but their state can not even with their consent make their case its case and compel the offending state and its authorities to appear as defendants in an action brought in this court."

Mr. Justice Brown concurring, says:

> "I am not prepared to say that if the State of Texas had placed an embargo upon the entire commerce between Louisiana and Texas, the State of Louisiana would not be sufficiently representative of the great body of her citizens to maintain this bill."

In other words, as was said by this court in the case of **In re Debbs, 158 U. S., p. 564:**

> "It is obvious from these decisions that while it is not the province of the government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet whenever the wrongs complained of are such as to affect the public at large and are in respect of matters which by the Constitution are intrusted to the care of the nation, and concerning which the nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or to prevent it from taking measure therein to fully discharge its Constitutional duties." **(Page 568.)**

The two cases which are the mainstay of plaintiff's contention are those of **Missouri vs. Illinois, 180 U. S., 208,** and **Kansas vs. Colorado, 185 U. S., 125.** Both cases, as we view it, are clearly distinguishable from the case at bar.

The case of **Missouri vs. Illinois, 180 U. S., 208,** is clearly distinguishable on these grounds:

(a) The injury alleged in the case was being done, or about to be done, under the direct authority of the State of Illinois through its sanitary officers.

(b) The means through which the damage was effected was a navigable stream in which the State of Missouri had a proprietary interest.

(c) The health and comfort of the citizens of the entire State of Missouri was threatened.

(d) The citizens injured had no remedy for the injuries threatened either at law or in equity, except in this court, and at the suit of their State, the State of Illinois not being subject to suit by private individuals.

The court in its opinion said **(Page 241)**:

> "An inspection of the bill discloses that the nature of the injury complained of is such that an adequate remedy can only be found in this court at the suit of the State of Missouri."

In the case at bar not only have the parties injured a full, adequate and complete remedy at law, **but they have open to them the same remedy which the State of Georgia is attempting to pursue in this court in their behalf, to-wit**: they may invoke the injunctive power of a court of equity either in the courts of Tennessee, or in the United States Circuit Courts.

It is no answer to say that the courts of Tennessee in the exercise of their discretion deny the injunction and confine the injured parties to their remedy at law. The remedy lies just the same whether it can be effectuated or not. Certainly no such excuse can be made for not proceeding in the names of these injured parties in the United States Circuit Courts.

This court further said **(Page 241)**:

> "The health and comfort of the large communities inhabitating those parts of the state situated on the Mississippi River are not alone concerned, but contagious and typhoidal diseases introduced in the river communities may spread themselves throughout the territory of the state. Moreover substantial impairment of health and prosperity of the towns and cities of the state situated on the Mississippi River, including its commercial metropolis, would injuriously affect the entire state."

We think it quite clear from this that the entire citizenship of the complaining state must be affected as a prerequisite to a suit by a state in its representative capacity. If the state can sue for a few individuals inhabiting an isolated community, why may it not sue for two or three individuals, or why may

it not take up the claim of one individual affected? We think it quite clear that the entire gist of the decisions of this court is to the effect that to entitle a state to sue by virtue of is sovereignty and as representative of its citizens, the injury threatened or being done must be general and to the entire citizenship of the state.

Judge Story so construes the section in his **Work on the Constitution, Vol. 2, Sec. 1638,** when he says:

> "8. To controversies between a state and citizens of another state: because, in case a state (that is all the citizens of it) has demands against some citizens of another state, it is better that she should prosecute their demands in a national court than in a court of the state to which those citizens belong" etc.

He further says in the **same Volume, Sec. 1685**:

> "It is not sufficient that it may have an interest in a suit between other persons, or that its rights, powers, privileges or duties come therein incidentally in question. It must be in terms a plaintiff or defendant, so that the judgment or decree may be binding upon it, as it is in common suits binding upon parties and privies."

A decree in this case on the merits would not be binding upon the citizens of these counties for whom the State of Georgia is assuming to act. Suppose upon a hearing upon the merits it should be held that plaintiff is not entitled to the relief sought, the parties in whose interest Georgia is assuming to act might immediately sue for the same relief in the courts of Tennessee, or the United States Circuit Courts, and the decree in this case would not be **res judicata** as to them.

This also furnishes a strong ground for the position that a state may not sue in its representative capacity when the

parties may themselves adopt the identical remedy in another forum.

Public policy requires that litigation should have a speedy end and courts will not take jurisdiction of controversies when their decrees will not be final and binding upon the parties and their privies.

Another distinction is: The injury threatened and being done in **Missouri vs. Illinois,** was to the health and comfort of the citizens of the State of Missouri. Whereas, the injury being done to the few citizens of Georgia who live in the counties named, is injury to property, compensation for which can be accurately approximated.

Kansas vs. Colorado, 185 U. S., 125, is clearly distinguishable. It is a suit to enjoin the diversion of the waters of a navigable stream and the practical destruction of the stream, in which the State of Kansas has a direct and proprietary interest. Of these species of property according to the law of nature and nations there is and can be no private ownership, but ownership is in the state as representative of the public. The proprietors of the banks have a right to use the land and water, subject to the right of the public, and neither the state nor the individuals have a right to divert the stream or render it less useful than its natural and customary flow.

3rd Kent's Commentaries, p. 445.

This discussion is applicable to both the **Missouri vs. Illinois** and **Kansas vs. Colorado** cases. In the nature of things there can be no individual proprietary rights in such streams as the Mississippi and Arkansas Rivers. They are necessarily the property of the public, whose interests therein are founded in natural right.

Kansas vs. Colorado is further distinguishable upon these grounds:

(a) Direct property interests of the State of Kansas were involved, it being alleged that plaintiff state owned a Soldiers' home situate on the banks of the river, which would be injured by the diversion of the water.

(b) It was alleged that the acts complained of were being done by, and under the direct authority of the State of Colorado.

(c) The private parties injured were without remedy save in this court and through the intervention of their state.

POINT 3.

Does the bill in this case show sufficient grounds for the equitable relief prayed for?

We submit that it does not, because:

(a) It shows that plaintiff and those whom she represents have been guilty of laches.

(b) Plaintiff hath not shown that the damages threatened are irreparable.

(c) Plaintiff and those whom she represents have full, adequate and complete remedy at law.

(d) Plaintiff shows no case for equitable relief such as to invoke the discretion of a court of equity to grant the injunction prayed for.

In considering this question the following propositions will be applicable:

(1) The exhibits to the bill will be taken as integral parts thereof.

Daniell's Chancery Prac., 6th Amer. Ed., 367.

(2) This court will take judicial cognizance of the laws and decisions of the Supreme Court of Tennessee.

Miles vs. Green, 159 U. S., 651.
Inde. vs. Batte, 6 Peters, 378.
Owens vs. Hull, 9 Peters, 607.
Lamar vs. Micou, 114 U. S., 218.

(3) This court will take judicial notice of the reports of the census in respect to the population and property interests in the counties in which the injuries are alleged to have occurred.

Hawkins vs. Thomas, 3 Ind. App., 409.
State vs. County, 128 Mo., 427.
Pickle vs. Williams, 64 Cal., 87.

LACHES.

On the question of laches the Supreme Court of Tennessee, in the case of **W. M. Madison vs. Tennessee Copper Co., and Ducktown Sulphur, Copper & Iron Co., 113 Tenn. Rep., p. 338,** said:

> "Prior to 1870 one Raht began the operation of a copper mine at Ducktown, and worked it for several years. Subsequently it was owned by the Union Consolidated Mining Company, Mr. Raht's successor. These operations were continued until the year 1879, and were then suspended until 1891. During the latter year the Ducktown Sulphur, Copper & Iron Company commenced operating the properties formerly owned and operated by the Union Consolidated Mining Company, and has continued to operate them ever since. The Pittsburg & Tennessee Copper Co. began operations at Ducktown about the year 1881, and then continued until about 1889, when it sold out to the defendant Tennessee Copper Company. The latter began its operations in 1900, and commenced roasting ores in May, 1901. It has continued its work ever since."

On pages 343-345, the court further said:

> "It is to be inferred from the description of the locality that there is no place more remote to which the operations referred to could be transferred.
>
> It is found, in substance, that, if the injunctive relief sought be granted, the defendants will be compelled to stop operations, and their property will be-

come practically worthless, the immense business conducted by them will cease, and they will be compelled to withdraw from the state. It is a necessary deduction from the foregoing that a great and increasing industry in the state will be destroyed, and all of the valuable copper properties of the state become worthless."

The following facts were also found, viz.:

"That the total tax aggregate of Polk County for the year 1903 was $2,589,931.43, of which total the assessments of the defendants amounted to $1,279,533.00. It is also found that prior to the operations of these companies there lived in the district where these works are located only 200 people, whereas there are now living in this district, almost wholly dependent upon these copper industries, about 12,000 people.

It is also found that one of the defendants, the Tennessee Copper Company, employs upon its pay roll 1,300 men, and that the average pay roll is about $40,000 per month, nearly all of which employees have been drawn from the population of Polk and neighboring counties.

It is further found that one of the defendants, the Tennessee Copper Company, consumes approximately 3,000 tons of coke, 2,800 tons of coal, and 1,000 cords of wood per month, and that it purchases and uses 2,110 car loads of coal, coke, wood, etc., per annum. In the year 1901 it purchased and used approximately 1,100 car loads of cord wood, cross ties, lumber and quartz. It was also found that eighty per cent of these supplies were purchased from and delivered by the citizens of Polk County. The aggregate paid out for supplies is not stated in the findings of the Court of Chancery Appeals, and can not be here stated accurately, but certainly the amount is very large; and it seems from the figures stated that one of the defendants alone, the Tennessee Copper Company, pays out

annually in wages in Polk County nearly a half million of dollars. The Court of Chancery Appeals finds that the other company employs between 1,100 and 1,200 people, and from this it may be inferred that the company pays out in wages and for supplies annually as much as the Tennessee Copper Company.

It is quite apparent that the two companies pay out annually vast sums of money, which are necessarily of great benefit to the people of the county, and that they are conducting and maintaining an industry upon which a laboring population of from ten to twelve thousand people are practically dependent; and it is found, in substance, by the Court of Chancery Appeals, that, if these industries be suppressed, these thousands of people will have to wander forth to other localities to find shelter and work."

On pages 355-356 the court further said:

"We are of the opinion that the complainants in the first bill are estopped to claim equitable relief against the defendant thereto by their laches. It is clearly to be inferred from the facts found by the Court of Chancery Appeals, and above noted, that these complainants had been suffering the injuries now complained of for ten years when the bill was filed without making any complaint of them in any forum. In the meantime the defendant had expended several hundred thousand dollars in making improvements in the plant, and the nature and source of the injury were such that the complainants could not be mistaken as to the cause or extent of it. Under such circumstances we are of the opinion that it would be inequitable to grant the severe remedy of injunction, but that the said complainants should be left to their actions for damages."

The court held that complainants in this case were guilty of laches, using the following language, and following citation of authority, (pages 351-352):

"And the equitable remedy by injunction must be applied for with reasonable promptness. There must be no laches. **Caldwell vs. Knott, 10 Yerg., 210, 212; W. J. Stamps et al vs. W. H. Hartford et al, MS. Nashville, December term, 1898; Bassett vs. Company, 47 N. H., 438, 441; Goodal vs. Crofton, 31 Ohio St., 271, 31 Am. Rep., 535; Whitney vs. Union Railway Co., 11 Gray (Mass.), 359, 71 Am. Dec., 715; Reid vs. Gifford, 6 Johns Ch., 19; Clifton Iron Co. vs. Dye, 87 Ala., 468-472, 6 Sou. 192; Traphagan vs. Jersey City, 29 N. J. Eq., 206; Morris, Etc. Ry. Co. vs. Prudden, 20 N. J. Eq., 530; Sprague vs. Rhodes, 4 R. I., 304; Gray vs. R. Co., 1 Grant, Cas. (Pa.), 412; Stewart Wire Co. vs. Lehigh Coal & Nav. Co., 203 Pa., 479, 53 Atl., 352; Powers Appeal, 125 Pa., 186, 17 Atl., 254, 11 Am. St. Rep., 882; Dana vs. Malentine, 5 Metc. (Mass.), 8; Sheldon vs. Rockwell, 9 Wis., 166, 76 Am. Dec., 262; Parker vs. Winnipiseogee Lake, Etc., Co., supra; Tuttle vs. Church, supra; Tuttle vs. Brightman (C. C.), 53 Fed., 429; Bankhart vs. Houghton, 27 Beav., 425; Great Western R. Co. vs. Oxford, Etc., R. Co., 3 De G., M. & G., 341, 359-361; Williams et al. vs. Earl of Jersey, I. C., R. & Ph. (18 Eng. Chan. Rep.), 91; Wood vs. Sutcliffe, 8 Eng. L. & Ep., 217, 2 Simmons (N. S.), 163; Weller vs. Smeaton, 1 Cox Cases in Eq., 102; Coper vs. Hubbuck, 30 Beav., 160, 166, 167; Birmingham Canal Co. vs. Lloyd, 18 Ves., 515; Graham v. Birkenhead, Etc., Ry. Co., 48 Eng. Ch. Rep., 2 M. & G., 146; Atty. Gen. vs. Sheffield Gas Consumers Co., 3 Dex. Gex., M. & G., 304, 52 Eng. Chan. Rep., 237.**"

In **Clifton Iron Co. vs. Dye, 87 Ala., 471,** it was held that standing by for three years without complaint would estop complainant. The court said:

"Clearly it was the duty of complainant to give the company some intimation of his objection, and not to stand by with full knowledge and permit it to make large outlays on these washers and then seek

the aid of a court of equity to arrest their operations. Reasonable diligence in assertion of his rights was the measure of complainant's duty in this case, and failing in this he must now seek relief in a court of law for any damage he may have suffered."

Practically the same rule has been laid down by this court in **Hammond vs. Hopkins, 143 U. S., at page 250,** in which this court said:

"No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith and reasonable diligence but will discourage stale demands, for the peace of society, by refusing to interfere where there have been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred. The rule is peculiarly applicable where the difficulty of doing entire justice arises through the death of the principal participants in the transactions complained of, or of the witness or witnesses, or by reason of the original transactions having become so obscured by time as to render the ascertainment of the exact facts impossible. Each case must necessarily be governed by its own circumstances, since, though the lapse of a few years may be sufficient to defeat the action in one case, a longer period may be held requisite in another, dependent upon the situation of the parties, the extent of their knowledge or means of information, great changes in values, the want of probable grounds for the imputation of intentional fraud, the destruction of specific testimony, the absence of any reasonable impediment or hindrance to the assertion of the alleged rights, and the like. **Marsh vs. Whitmore, 21 Wall, 178; Lansdale vs. Smith, 106 U. S., 391; Norris vs. Haggin, 136 U. S., 386; Mackall vs. Casilear, 137 U. S., 556; Hanner vs. Moulton, 138 U. S., 486.**"

The same subject was also considered by this court in **Galliher vs. Cadwell, 145 U. S., 371-2,** in which the court said:

> "The laches of the appellant is such as to defeat any rights which she might have had, even if these prior questions were determined in her favor; and in this respect it is worthy of notice that there has been in a few years a rapid and vast change in the value of the property in question. It is now an addition to the city of Tacoma. The census of 1880 showed that to be a mere village, the population being only 1,098. The census of 1890 discloses a city, the population being 36,006. Of course such a rapid increase during this decade implies an equally rapid and enormous increase in the value of property so situated as to be an addition to the city. And the question of laches turns not simply upon the question of years which have elapsed between the accruing of her rights, whatever they were, and her assertion of them, but also upon the nature and evidence of those rights, the changes in value, and other circumstances occuring during that lapse of years. The cases are many in which this defence has been invoked and considered. It is true that by reason of their differences of fact no one case becomes an exact precedent for another, yet a uniform principle pervades them all. They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights and an ample opportunity to establish them in the proper forum, that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that because of the change of conditions or relations during this period of delay, it would be an injustice to the latter to permit him to now assert them."

To the same effect are:

Speidell vs. Henrici, 120 U. S., 377.
Williard vs. Woods, 164 U. S., 50.
Lane & Bodley Co. vs. Locke, 150 U. S., 193.
Whitney vs. Fox, 166 U. S., 637.

As we view it, the principles of law announced in the foregoing cases are controlling upon this question. The bill in this case and the decisions above referred to show that this copper industry has been building up, without protest on the part of plaintiff, in this Ducktown basin, where it is now situated, for the last thirty-five years, or more; that the Ducktown Sulphur, Copper & Iron Co., Limited, began its operations in 1891, and have continued them ever since to the present time; that the Pittsburg & Tennessee Copper Co., predecessors in title of the Tennessee Copper Company, began its operations in 1881, and continued until 1899, at which time it sold out to the defendant Tennessee Copper Company, and that the Tennessee Copper Company has been operating its plant ever since.

It is further shown that these companies have continually increased their investments by way of improvements until now they have expended more than two million dollars, and have built up an enterprise upon this formerly desert waste, and the town consists almost exclusively of the employees of these defendants, something like twelve thousand people dependent upon these industries for their living.

We submit to the court that since the State of Georgia, and the parties whom she is assuming to represent, have stood by without protest during all of these years and allowed these defendants to expend these vast sums of money in this enterprise, that she will not be permitted now to the detriment of these defendants and the thousands of people dependent upon the continued operation of these industries to maintain a bill for injunctive relief against the same.

In brief, equity will not permit one to stand by and see another expend large sums of money in the exercise of a supposed right, and then assert a hostile claim that would destroy the investment.

THREATENED INJURY NOT IRREPARABLE.

The injury which it is alleged is being done and will be done, is injury to property, and damages or compensation for which is susceptible of accurate approximation.

It is true that in the bill there is a vague allegation as to injury to health. This allegation is as follows:

> "By said poisonous smoke and gases the atmosphere over and upon said territory of your orator has been and is now rendered noisome, foul, unwholesome and difficult to breathe, and the health of your orator's citizens and inhabitants of said locality has been, and unless said nuisance is at once abated will be still further seriously injured and impaired, their vitality lessened, their susceptibility to all diseases greatly increased."
>
> **(Bill, p. 6.)**

Exhibit "A" to the bill, being a report of the Committee to the Governor of Georgia, describes the damage simply as "destroying vegetable life for a very considerable distance." **(See p. 18.)**

Nothing in this report as to injury to health.

The report of the State Entomologist **(p. 20)** describes the damage in detail, showing that it is simply injury to vegetation in that locality. There is nothing in this report about injury to health.

Exhibit "C" to the bill **(p. 24)**, being a letter from the Governor of Georgia to the Governor of Tennessee, complains that: "The timber, fruits, and agricultural interests are suffering." Nothing in this with reference to injury to health.

Exhibit "F" to the bill **(p. 29)**, being report of the Forestry Department, describes in great detail the damage being done, showing that it is simply to timber and vegetation in

that locality. Nothing in this report with reference to injury to health.

Exhibit "G" **(p. 36)** is the report of the Second Committee, and describes in detail the damage being done. Nothing in that report about injury to health.

The U. S. Census Reports for 1880, 1890 and 1900 for Fannin County, Georgia, being the county adjacent to these copper works, and where the great amount of injury, if any, is being done, shows a statement of facts rather remarkable in view of the allegations of the bill:

Fannin County, Georgia.

Population in 1880	7,425
Population in 1890	8,724
Population in 1900	11,214

Agriculture, Live Stock, Farm Improvements.

Value of	1900	1890	1880
Land and improvements including buildings	$625,080	$483,130	$345.113
Implements and Machinery	25,870	18,150	18,930
Live Stock	184,831	149,670	110,324
Farm Products	275,632	182,140	142,630

We submit that the court will not fail to consider these facts shown by the returns of the census as a part of the history of the country, and which demonstrate that, instead of the territory alleged in the bill to be affected by the operations of the defendants copper companies, being in danger of becoming a barren waste, that its material progress and development is phenomenal, and that it is but fair to attribute some portion, at least, of this development and increase in population to the operation of these great copper works, giving employment to hundreds of laborers, expending thousands of dollars, sustain-

ing a population of thousands of people, and furnishing a near market for the farm products of the land owners of Fannin County, Georgia, which increased during the decade ending in 1900 in value to the extent of $93,000, as against an increase of only $40,000 during the decade immediately preceding the beginning of continuous operations by defendant copper companies.

It clearly appears from this report that not only has the population increased, but increased more largely during the decade during which these works have been in operation than during the decade previous thereto. The same condition exists with reference to the value of the lands, farms, products, etc., and demonstrates clearly, as we think, that the State of Georgia has suffered no injury thereby to her taxable values, and that the injury to the property of the citizens of Georgia who live close to these reduction works is very trifling, if any.

CITIZENS OF GEORGIA HAVE COMPLETE REMEDY AT LAW AND IN EQUITY IN THE COURTS OF TENNESSEE.

The following statutes of Tennessee have conferred upon her courts full and adequate power in the premises:

> "Section 5158. ABATEMENT OF NUISANCE. In all suits brought for the recovery of damages resulting from any nuisance, and the finding that the matter complained of is a nuisance, the court may immediately, upon petition of the plaintiff in writing, order the nuisance to be abated in the same manner and to the same extent as the Chancery Courts, without resort to a court of equity for that purpose. **(1851-52, Ch. 146, Sec. 2.)**
>
> "Section 6750. UNHEALTHY NUISANCE BY TRADE. The erecting, continuing, or using any building or other place for the exercise of any trade, em-

ployment, or manufacture, which, by occasioning noxious exhalations, offensive smells, or otherwise become injurious and dangerous to the health of individuals, or the public, is a nuisance, and may be abated accordingly.

"Section 6752. PUNISHMENT AND ABATEMENT. Such offense shall be a misdemeanor. The court may cause nuisances to be abated at the defendant's expense, as provided in Section 6871.

"Section 6756. CHANCERY COURTS MAY ABATE NUISANCE. Any Chancery Court having jurisdiction over the territory, upon which such nuisance is erected, done, committed or suffered, shall also have jurisdiction to abate the same, upon application of any person interested.

"Section 6871. ABATEMENT OF NUISANCE. Upon conviction, the court may order the nuisance to be abated by the sheriff of the county, at the expense of the defendant. **(1843-44, Ch. 153, Sec. 2.)**

Shannon's Code, Secs. 5158, 6750, 6752, 6756, 6871.

It will thus be seen that the laws of Tennessee are ample for the protection of property of the citizens of Georgia, and for the abatement of any nuisance which might be created and which a court of equity in its discretion might see proper to abate.

NO SUFFICIENT FACTS SET FORTH FOR THE EXERCISE OF DISCRETION.

In **Richard's Appeal, 57 Pa. St., 105,** the court said:

"An error seems somewhat prevalent in parts at least of this commonwealth in regard to proceeding in equity to redress a commission of a nuisance. It seems to be supposed that, as at law, whenever a case is made out of wrongful acts on the one side and consequent injury on the other, a decree to restrain the act com-

plained of must as certainly follow as a judgment would follow a verdict in a common law court. This is a mistake. It is elementary law that in equity a decree is never of right as a judgment at law is, but of grace. Hence the Chancellor will consider whether he will not do the greater injury by enjoining than would result from refusing, and leaving the party to his redress at at the hands of a court and jury. If in conscience the injury should not appear, he should refuse the injunction. **Hilton vs. Earl of Granville, 1 Craig Ph. Ch. R. 294.**"

In **Hilton vs. Earl of Granville,** it appeared that the mining operations of the defendants, in which they had several hundred thousand dollars invested, were threatening to undermine and destroy plaintiff's dwelling house, but as the damage might result to him if he suffered the injury was susceptible of approximate compensation, and as the stopping of the mining operations by the injunction would entail upon the defendants irreparable injury, the injunction was refused.

In **Madison vs. Copper Companies, 113 Tennessee, 355,** this question is thoroughly considered and the authorities reviewed. The court **(pages 358-359),** said:

"But there is another principle which is of controlling influence in this department of law, and in the light of which the foregoing principle must be weighed and applied. This is that the granting of an injunction is not a matter of absolute right, but rests in the sound discretion of the court to be determined on a consideration of all of the special circumstances of each case, and the situation and surroundings of the parties, with a view to effect the ends of justice.

A judgment for damages in this class of cases is a matter of absolute right, where injury is shown. A decree for an injunction is a matter of sound legal discretion, to be granted or withheld as that discretion

shall dictate, after a full and careful consideration of every element appertaining to the injury.

These propositions will be found to be substantially confirmed and enforced in the following authorities:

In **Clack vs. White** (a nuisance case) it is said: "It is also admitted in defendant's answer that the way was open and that he afterwards obstructed and closed it. So that both the legal title to the way and its obstruction by defendant appear in the present record. But it does not follow as a corollary that therefore the injunction will lie. The special injunction is not a writ of right, but it rests in the sound discretion of the court; and hence Mr. Story says: 'No injunction will be granted whenever it will operate oppressively or inequitably, or contrary to the real justice of the case.'" **2 Story Eq. Jur. Section 959; 2 Swan, 545.**

In **Wood on Nuisances (3 Ed.), p. 1182**, it is said: "The true intent of a court of equity being to do justice between parties, it will not issue a restraining order except where the rights of the parties demand it, and, in determining this question, all the circumstances of location, the effect of the act claimed to be a nuisance, and the effect upon the defendant's business and interests will be considered; and, while the usefulness of the business, or its performance, magnitude, or extent will not in all cases prevent interference, yet, if the injury on the one hand is small and fairly compensable in damages, and the loss to the other party would be large and disastrous, an injunction will be refused and the party left to his legal remedy."

The court further said on **pages 360 and 361**:

"And so, too, the court is bound to compare consequences. If the fact of an actionable nuisance is clearly established, then the court is bound to consider whether a greater injury will not be done by granting

an injunction, and thus destroying a citizens property and taking away from him his means of livelihood, than will result from a refusal, and leaving the injured party to his ordinary legal remedy; and if, on thus contrasting consequences, it appears doubtful whether greater injury will not be done by granting than by withholding the injunction, it is the duty of the court to decline to interfere. **Hilton vs. Earl of Granville, 1 Cr. & Ph., 283.** The duty of granting or refusing an injunction is a matter resting in sound discretion. It should never be granted when it will operate oppressively or contrary to the real justice of the case, or where it is not the fit or appropriate method of redress under all the circumstances of the case, or when it will or may work fatal injury to the person enjoined. **Jones vs. City of Newark, 11 N. J. Eq., 452, 34 N. J. Eq., 469.** See also **Chartier's Block Coal Co. vs. Mellen (Pa.), 25 Atl., 597, 18 L. R. A., 702, 34 Am. St. Rep., 645; Fesler vs. Brayton (Ind.), 44 N. E., 37, 32 L. R. A., 578.**"

Without further elaborating on these authorities we submit to the court upon this point that these propositions are clear:

(a) An injunction is never a matter of absolute right, but of grace, and within the orderly discretion of the court.

(b) The court will not grant an injunction where its results would be oppressive, especially where damage suffered is susceptible of accurate approximation.

We submit that the court will not grant an injunction in a case like this where the effect of the injunction would be to destroy an investment of hundreds of thousands of dollars; where its effect would be to destroy a prosperous and thriving mining town of twelve thousand people which has grown up upon practically a desert waste; especially when this industry has been developing without protest from plaintiff during a

period covering thirty or forty years; when these defendants have been thus permitted to expend these large sums of money in the exercise of a supposed right in this community; and that these citizens of Georgia who have been and are now being injured by the operation of these plants will be confined to their remedy in a court of law.

Upon each and every one of these propositions we respectfully but earnestly submit to the court that the demurrer is well taken and the suit should be dismissed.

Respectfully submitted,

HOWARD CORNICK,
JOHN H. FRANTZ,
Attorneys for Tennessee Copper Co.

MARTIN H. Vogel
Counsel.

Orig.

O.T. 1906

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Clerk.

No. 5 ORIGINAL.

In the Supreme Court of the United States,

OCTOBER TERM, 1905

No. 1 O
O.T. 19

The State of Georgia, by its Attorney General, John C. Hart, Plaintiff,

vs.

The Tennessee Copper Co. and the Ducktown Sulphur, Copper and Iron Co., Limited, Defendants.

IN EQUITY.

Answer of the Ducktown Sulphur, Copper and Iron Co., Limited, to the Rule to Show Cause, Etc.

JAS. U. PARKS, Attorney,
Cleveland, Tenn.

No. 13 ORIGINAL.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

STATE OF GEORGIA,
BY ITS ATTORNEY GENERAL, JOHN C. HART,
Plaintiff,

vs.

THE TENNESSEE COPPER COMPANY AND THE DUCKTOWN SULPHUR, COPPER & IRON COMPANY, LIMITED,
Defendants.

IN EQUITY.

The Answer of the Ducktown Sulphur, Copper & Iron Company, Limited, to the Rule to Show Cause Why a Temporary Restraining Order Should Not Issue, etc.

This defendant, not now answering or otherwise making defense to the bill of complaint filed in this cause, but saving and reserving to itself the right to make hereafter any and all defenses thereto, and now answering only unto the rule of this Honorable Court to appear and show cause why a temporary restraining order should not be issued against it, says in discharge of said rule,

First.

That this defendant is a corporation created and organized under the laws of Great Britain, and that having complied with the laws of Tennessee it is authorized to carry on its corporate business in that state.

Second.

It is true that this respondent is now, and for some time past has been, engaged in the mining and smelting of copper ores at Ducktown, Polk County, Tennessee. In fact, it has been thus engaged for a long period of time, to-wit: more than twelve years. It is not now, nor has it heretofore been treating other than copper ores, and the method of treatment is simply to smelt them in ordinary water-jacketed blast furnaces.

Third.

Copper was first discovered at Ducktown about the year 1849. Extensive operations were carried on until about 1879, when, on account of lack of railway facilities, the low price of copper, the fact that the richer ores had been worked out, the increasing cost of fuel because of the distances it had to be hauled, and possibly other causes, the mining companies were forced to suspend. In 1891, after railway connection with the region had been completed, this respondent first came into the field. Up to this time no method or process had ever been found by which ores of this character could be successfully worked, except by that known as the open-heap roasting process. It had always been found impossible to smelt the ores without first eliminating the greater part of their sulphur contents by preliminary roasting in large heaps in the open air. No way had ever been found by which the sulphur in ores of this class could be successfully utilized as a by-product. Notwithstanding this fact, this respondent spent about two years and about two hundred thousand dollars in various tests and experiments having for their object the possible discovery of some way by

which the iron and sulphur in the ores could be saved. These tests and experiments were made under the most eminent expert advice and direction, but they all failed and finally this respondent was forced to fall back to the old process with all its wastefulness as the only alternative of quitting the field.

These facts are shown in the affidavits of Dr. P. de P. Ricketts and W. H. Freeland, respectively exhibits A and B hereto, to which reference is prayed.

Fourth.

In 1893 this respondent erected its open-heap roast-plant at a point locally known as Cartertown, and its smelting-plant at Isabella. Said smelting-works are about three miles from the nearest point on the Georgia state line, and the said roast-plant when in use was about two miles from said line. Roasting operations were continuously carried on at said roast-plant during a period of about nine years, to-wit: from 1893 until August, 1902.

Something over three years ago this respondent's general manager perfected a process by which said ores can be successfully smelted without preliminary roasting. It consists simply in smelting the green, unroasted ores in the ordinary furnaces used for smelting the roasted ores. When this process was adopted said roast-plant was abandoned and has not since been used. All of this respondent's reduction operations since that time have been carried on at its said smelting works about three miles from the Georgia state line.

These facts are shown in the affidavits of W. H. Freeland, exhibit B; J. M. Center, exhibit C; D. M. Stuart,

exhibit E; and M. T. Fouts, exhibit F, to all of which reference is prayed.

Fifth.

Respondent says that the averment in paragraph nineteen of complainant's bill, to the effect that this respondent abandoned open-heap roasting shortly after complaint was made to the legislature of Georgia is erroneous. It appears that the resolution of that body was adopted August 17th, 1903, whereas this defendant had ceased open-heap roasting in August, 1902. Nor is it a fact as to this defendant, as might be inferred from paragraph twenty of said bill, that in adopting said new method or process any new or different furnaces, kilns, or other appliances were erected or have been since used. Nor is it true as to this defendant, as might be implied from paragraph twenty-three of said bill, that as a part of the appliances used with said new method or process this defendant has erected and is using tall chimneys or stacks two or three hundred feet high, whereby the fumes are thrown off at a much greater elevation and thereby diffused and extended over a much larger area than when open-heap roasting was practiced, even if this conclusion be sound. On the contrary, this defendant has been and is using only the ordinary furnaces with common tubular iron smoke-stacks about sixty feet high, the same as were used in smelting the roasted ores. Its smelting plant is also located in a hollow or ravine below the mean level of the region, and somewhat below the site of its old roast-plant, and it is practically surrounded by near-by hills and ridges that are much higher than the tops of the furnace stacks. While it is doubtless true that at the point of exit from the furnace stacks the

fumes are stronger than those coming from a like area in an open-heap roast-plant, it is equally true that when they have been diffused or scattered over an area equal to that of the roast-plant, they are no stronger than those coming from open heaps.

These facts are shown by the affidavits of W. H. Freeland, exhibit B, and J. M. Center, exhibit C, to which reference is prayed.

Sixth.

This respondent denies that the fumes arising from its said operations are of such quantity or quality as to cause or in any appreciable degree contribute to the alleged wrongs and injuries to the State of Georgia as set out in the bill. It may be true that some four or five years ago, before this defendant ceased open-heap roasting and when its fumes were generated about one-third nearer to complainant's territory than at present, some slight injury may have resulted to the young growth timber of a few persons living near the state line, but even this is questionable. While under the laws of Tennessee citizens of Georgia have the same right as resident citizens to sue in the courts of this state for injuries resulting to their lands from any nuisance maintained in this state, yet during the many years respondent was carrying on operations at said roast-plant only four citizens of Georgia, and one non-resident whose land lay partly in that state, ever complained of this defendant in the courts of this state, or in any other court, on account of alleged injuries from said fumes. And during the three years and over since this defendant ceased open-heap roasting and since all of its reduction operations have been carried on at its said smelting plant, no

resident or land owner of Georgia has made complaint of such injury. Neither has any claim on the part of such person or persons been presented for adjustment out of court. After said complaints were filed a committee of impartial men made careful inquiry into the alleged grounds thereof, but no injury whatever from the fumes was found. The lands involved embraced about eight hundred acres and their total assessed valuation for taxes amounted to less than fifteen hundred dollars.

These facts are shown by the affidavits of J. M. Center, exhibit C; M. T. Fouts, exhibit F; B. P. Rollins, exhibit G; and G. C. Parks, exhibit H, to all of which reference is prayed.

Seventh.

The only hurtful component of said fumes is sulphurous acid gas. If this be precipitated by moisture before the fumes become sufficiently diluted or scattered it proves more or less injurious to most forms of vegetation in the neighborhood of the works; but it is denied that the fumes coming from this defendant's works are sufficient to produce or materially contribute to the injuries complained of in the bill.

Nor is it a fact that the fumes coming from the works of both defendants have destroyed all vegetables, grains, grasses, timber, crops, etc., over considerable portions of five counties, as charged in the bill. It is true that since the Tennessee Copper Company located its works near the state line some injury has resulted over a limited area in Fannin county; but even here it is not true that all vegetation has been killed, the soil denuded and rendered barren and sterile, thereby causing freshets, floods and overflows, and thereby causing the barren,

sterile soil to be washed down and deposited upon the richer bottom lands below, and thereby causing the highways to be washed into holes, gullies and ruts.

Prior to the suspension of mining operations in 1879, the original forests had been cut off for many miles in every direction from the mines. In fact, the scarcity of fuel was one of the causes of said suspension. During said period of suspension a young or second growth sprang up. The greater part of this for many miles around has been used in roasting operations, thus giving the region a barren appearance as to timber. But all over the region, except within a few hundred yards of the works, the wild grasses grow more luxuriantly than further away in the timber, thereby furnishing a better means of retaining the soil and its moisture than ever the timber did. There is little or no merchantable timber in the region, most of it having long since been used by the defendants themselves. The alleged injury to crops, orchards, etc., have been greately exaggerated. As good crops as the land has ever been capable of producing have been raised during the past several years within a mile of the works of the defendant Tennessee Copper Company. There are but few tracts of land within three miles of the works of this respondent, the Ducktown Sulphur, Copper & Iron Company, upon which farming has ever been attempted, and there are none in Georgia closer to its works than those of the four persons mentioned in the sixth paragraph herein.

These facts are shown in the affidavits of J. M. Center, exhibit C; M. T. Fouts, exhibit F; and G. C. Parks, exhibit H, to which reference is prayed.

Eighth.

The charge that said fumes in the form and quantity in which they occur at the mines are injurious to health is not borne out by the facts. On the contrary they are generally regarded as being not only destructive of disease-breeding germs, but as having marked therapeutic value in many morbid conditions, notably those of the air-passages, such as asthma, catarrh, tuberculosis, etc. Actual experience has shown that men working at the roast-piles where the fumes occur in their most concentrated form have not only not been injured thereby, but in many instances have been decidedly benefitted. And the charge that they shut out the sunlight and darken the atmosphere is as true of any smoke coming from any ordinary manufacturing plant of like proportions. In fact, they are not as dark, nor apparently as thick as the smoke coming from an ordinary plant using bituminous coal. The region has many mountain streams and is subject to fogs and mists. Occasionally, perhaps on an average of once a month, these fogs settle during the early morning hours and whatever of fumes may be in the air come down with them. In fact, the so-called smoke has more the appearance of an ordinary fog than anything it can be likened to; and, like a fog, it rises and is dissipated by the morning sun. The smoke conditions in many cities, aside from the question of injury to vegetation, are worse than those at Ducktown. In short, the dense, black, irrespirable qualities of ordinary coal smoke are absent, and the quantity of sulphurous acid gas in the fumes is not sufficient to produce physical harm, or even discomfort under ordinary circumstances.

These facts are shown in the affidavits of J. M. Center,

exhibit C; G. C. Parks, exhibit H, and W. H. Freeland, exhibit B, to which reference is prayed.

Ninth.

It is respectfully shown that said mines are located in a remote mountainous region, not fitted by nature for ordinary agricultural uses. It is about eighteen hundred feet above the sea level and is surrounded by high mountains, some of which reach an altitude of 4,300 feet, forming what is locally known as the "Great Copper Basin." This basin embraces about one hundred square miles and is itself traversed by high hills and ridges, some of which might not improperly be classed as mountains themselves. The soil is rocky, thin and sterile. There is little or no cultivable land, except small areas lying in strips along the streams. The hill and ridge land, as a rule, would not pay for clearing and fencing. There have never been but few farms in the whole region that were capable of producing enough to carry their owners from one season to another. The timber interests of the district amount to little or nothing. The original forests were such as would naturally be expected in a region of thin soil, but, as already shown, the greater part of the timber for eight and ten miles around has been used in mining operations. The mining interests are vastly paramount to all others. This is apparent in many ways. The entire population of the district before the resumption of operations in 1891, respondent is informed, amounted to barely two hundred, while now it is estimated at from eight to ten thousand, practically all dependent upon the working of the mines. The defendants pay taxes upon assessments greater than that of the entire county before operations were resumed. In

short, said region is better suited in every way for the carrying on of the operations complained of than any other known accessible district in that part of the country. And while the copper ores at Ducktown are seemingly inexhaustible in quantity they are of such low grade as to make it commercially impossible to ship them any considerable distance to another district for treatment, even if a more suitable one were known.

These facts are shown in the affidavits of W. H. Freeland, exhibit B; J. M. Center, Exhibit C; D. M. Stuart, exhibit E; M. T. Fouts, exhibit F; B. P. Rollins, exhibit G; and G. C. Parks, exhibit H, to which reference is prayed.

Tenth.

And now having answered unto the rule of this Honorable Court, this respondent prays to be hence discharged and dismissed.

THE DUCKTOWN SULPHUR, COPPER & IRON COMPANY, LIMITED.

By JAS. G. PARKS,
Attorney.

(CORPORATE SEAL)

STATE OF TENNESSEE,
COUNTY OF POLK,

On this the 18th day of November, 1905, personally appeared W. H. Freeland, who made oath in due form of law that he is the general manger of the defendant, The Ducktown Sulphur, Copper & Iron Company, Limited, and that as such he is the highest officer at its local

office in Polk County, Tennessee; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated as on information, and as to those matters he believes it to be true, and he has caused the seal of said company to be hereto affixed in further attestation.

W. H. FREELAND,
General Manager.

Sworn to and subscribed before me
on the day and year above written.

G. G. HYATT,
Notary Public.

(SEAL)

EXHIBIT A.

Affidavit of Pierre de P. Ricketts.

IN THE SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1905.

STATE OF GEORGIA,
BY ITS ATTORNEY GENERAL, JOHN C. HART,
Plaintiff,

vs.

THE TENNESSEE COPPER COMPANY AND THE DUCKTOWN SULPHUR, COPPER & IRON COMPANY, LIMITED,
Defendants.

No. 13 ORIGINAL.

STATE OF NEW YORK }
COUNTY OF NEW YORK. }

Before me, Charles Alvin Rogers, a notary public in and for said county, personally comes Pierre de P. Ricketts, who, being first duly sworn according to law, deposes and says:

That he is a resident of the city of New York, and that his profession is that of a metallurgist and mining engineer. That he graduated from Columbia College, School of Mines, in 1871, taking the degree of Mining Engineer and subsequently taking that of Doctor of Philosophy. That since graduation he has been actively engaged in his profession in connection with mining

and metallurgical propositions in various parts of the country, and having for the past several years held the chair of Analytical Chemistry and Assaying in said college, but now resigned.

That he has been familar with the Ducktown copper mines and their ores for many years, reaching as far back as 1867 in the time of the old Union Consolidated Mining Company, and that for the past ten or twelve years he has been personally familiar with them by reason of having often visited them in a professional capacity. That the ores remaining there are large in quantity, but of extremely low grade—so much so as to make it commercially impracticable to ship them any considerable distance to another district for treatment.

Affiant further states that when the Ducktown Sulphur, Copper & Iron Company, Limited, went into that district about 1891 he acted as its consulting engineer and metallurgist, and that under his advice and direction the better part of two years and something like two hundred thousand dollars were expended in various tests and experiments to find some way of utilizing the iron and sulphur contents of the ores; that stall-roasting, kiln-roasting, roasting in revolving cylinders, and various other methods, were tried. Special kilns of extensive character were built. None of them were successful, and it was upon affiant's advice that the company finally fell back upon the only method theretofore used, to-wit: preliminary open-heap roasting before smelting.

Affiant is advised that within the past few years Mr. W. H. Freeland, the general manager of said company, has made a success of smelting the ores without such preliminary roasting, and that the same method is also

being successfully used by the Tennessee Copper Company.

Further this deponent saith not.

PIERRE de P. RICKETTS.

Sworn to and subscribed before me,
this 14th day of November, 1905.

CHARLES ALVIN ROGERS,
Notary Public No. 6,
New York County, N. Y.

(SEAL)

EXHIBIT B.

Affidavit of W. H. Freeland,

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1905.

STATE OF GEORGIA,
BY ITS ATTORNEY GENERAL, JOHN C. HART,
Plaintiff,

vs.

THE TENNESSEE COPPER COMPANY AND THE DUCKTOWN SULPHUR, COPPER & IRON COMPANY, LIMITED,
Defendants.

No. 13 ORIGINAL.

STATE OF TENNESSEE,
COUNTY OF POLK.

Before me, G. G. Hyatt, a notary public, in and for said county, personally comes W. H. Freeland, who, being first duly sworn according to law, deposes and says:

That he is a mining engineer of many years experience, and is the general manager for the defendant, The Ducktown Sulphur, Copper & Iron Company, Limited; that said defendant's mines and plant are located at Ducktown, Polk County, Tennessee, where for more than twelve years past it has been engaged in the mining and smelting of copper ores.

Affiant shows and states that the Ducktown copper mines are located in a remote, mountainous region, not

fitted by nature for ordinary agricultural uses. Said region is about eighteen hundred feet above the sea-level and is practically surrounded on all sides by towering mountains, some of which reach an altitude of 4,300 feet and forming what is locally known as the "Great Copper Basin." This basin embraces one hundred square miles or more of territory and is itself traversed and bisected by high hills and ridges which might not improperly be classed as mountains themselves. Said region is not only hilly and mountainous, but the soil is thin, rocky and naturally sterile and unproductive, there never having been at any time in said region but few farms capable of producing sufficient crops to suport their owners from one season to another. There is little or no cultivable land, except small areas lying in narrow strips along the borders of the mountain streams. The soil of that lying on the hill and mountain sides is, as a general rule, so thin and poor as not to be worth the labor necessary to clear and fence it for cultivation. Most of the small land owners in the territory are and have been largely dependent upon the working of the mines for a living. The defendants themselves own large areas of these outlying lands and they are and have been regarded as having little or no value, except for the young or second-growth timber that has been cut from them for use in the roasting operations hereinafter mentioned. Affiant is informed and believes that during the period of suspension of mining operations from 1879 to 1891 such lands were usually rated at from twenty-five cents to fifty cents per acre, while such of the lands as were used for farming were seldom rated at more than one dollar per acre.

Affiant further states as a matter of history that said copper mines were first discovered about the year 1849. Within the next two or three years a large number of mines were opened in the district. Large amounts of capital were invested. What had theretofore been practically an uninhabited wilderness became a populous and thriving mining centre. It is said that immediately prior to the discovery of copper the entire yield of state and county revenue from all realty, personalty and polls in the district was only seven dollars and fifty cents, but that shortly thereafter Polk county stood third in the list of the highest tax-paying counties of the state. Mines were opened all over the region, furnaces and reduction works were erected and at the time of the suspension of operations millions of dollars worth of copper had been sent to the markets of the world. During said period, coal and coke being unobtainable on account of the lack of railway transportation, the forests for a distance of eight and ten miles were felled for fuel in the shape of cord-wood for roasting and for making charcoal for use in smelting the ores. Finally, about 1878, on account of the lack of railway transportation, the increased cost of fuel because of the distances it had to be hauled, the low price of copper, the fact that the richer grades of ores had been exhausted, and possibly other causes, the companies were forced to suspend. The business was wound up by a receiver and in 1879 the final shut-down came. What had been a populous and thriving and industrial centre became, in fact, a deserted village, having in 1890 a poulation of barely over two hundred. There was no employment for labor and a day's work, when it could be had at all, commanded only

fifty cents. The market in which the farmers for many miles around had found a ready sale for their surplus products was gone. Business stagnation ruled.

This was the state of affairs when in 1891 this defendant, the Ducktown Sulphur, Copper & Iron Company, Limited, **cameinto** the **field,** seeking to restore the once prosperous conditions. It found all the richer ores exhausted. There remained large and practically inexhaustible bodies of low-grade ores yielding on an average about 2½ per centum of copper. It was believed by many eminent mining engineers that these ores could not be profitably worked, while others believed it to be possible, provided their iron and sulphur contents could be saved as by-products. At that time no process had ever been found by which ores of this character could be successfully treated, except by what is commonly known as the method of open-heap roasting. This consisted simply of a preliminary roasting of the ores on layers of cordwood in the open air. The object was to eliminate their sulphur contents. Up to that time it had never been found possible to smelt the ores in furnaces without first expelling the greater part of the sulphur by such preliminary roasting. Knowing this, the said defendant spent about $200,000 and nearly two years of time under the most eminent expert advice and direction in the search for some way by which the iron and sulphur in the ores could be saved as by-products. Many new experiments, as well as every known method of treating copper ores, were tried, but all proved fruitless. The defendant was foced either to fall back upon the old method, which had always theretofore been used, or else quit the field. Affiant is also informed and believes that

some of the leading copper companies have had for many years standing rewards for the discovery of a method or process by which the iron and sulphur contents of such ores may be utilized. That there is every financial inducement for saving them is self-evident.

Affiant further states that in 1893 said defendant erected and put in operation its smelting plant which has been in almost continuous operation ever since. For a period of about nine years the plan of treatment, as already indicated, was first to roast the ores in large open-heaps for the purpose of expelling the sulphur. The next step was to smelt the roasted ores in ordinary water-jacketed blast furnaces, producing approximately a fifty per cent. matte, in which form the product was and has since been marketed. About three years ago, however, affiant perfected a process by which said preliminary roasting is made unnecessary. It consists simply in smelting the green, unroasted ores in the ordinary furnaces heretofore used in smelting the roasted ores. It is a distinct step toward the ultimate and much hoped-for utilization of the sulphur fumes in the manufacture of sulphuric acid. While it has been manifestly impossible to collect and condense the fumes arising from heaps covering several acres of ground, now that those generated in smelting are necessarily confined to the small compass of the furnace stacks, it is hoped that it will be found practicable to condense and precipitate them. This defendant has been and is now investigating the problem and making preparations to install a plant for said purpose with reasonable grounds to hope that it will prove successful.

The foregoing shows the methods and appliances

used by said defendant ever since it began operations more than twelve years ago. Furnaces and other appliances worn out have been replaced, but no new or different appliances or methods, causing said fumes to be worse in volume or more noxious in quality, have been recently installed by this defendant.

Affiant further states that from the year 1893 until August, 1902, this defendant carried on its open-heap roasting operations at a point locally known as Cartertown, which is about one mile nearer to the Georgia state line, and upon somewhat higher ground than the smelting plant. Since the abandonment of open-heap roasting operations by this defendant in 1902, its reduction operations have been carried on altogether at its said smelting plant, which is three miles or further from said state line. For a period of several years, beginning about 1892, another corporation, the Pittsburgh & Tennessee Copper Company, carried on operations, its roast plant being located at what is known as the Polk County Mine, about three-fourths of a mile from said state line. About 1899 the defendant Tennessee Copper Company came into the field, purchasing the property of the above-named company and other mines, and beginning its open-heap roasting operations about April, 1901.

Affiant further states that although it has been many years since the Supreme Court of Tennessee held that citizens of adjoining states may sue in the courts of this state for injuries resulting to their lands from smoke or fumes generated in this state, yet, during the entire period of twelve years or longer, covering said operations, only four residents of the state of Georgia, and one non-resident whose lands lie partly in both states,

have ever complained of this defendant in the courts of Tennessee, or in any other court or courts, on account of injuries alleged to have resulted from said fumes. And no claim or demand on the part of any citizen or resident of Georgia has ever been presented for compromise or settlement out of court. The names of the above-mentioned five persons are W. M. Madison, M. A. Madison, T. M. Ross, Jr., W. P. Ledford, and A. J. Fortner. Their lands embrace about eight hundred acres, the total valuation of the same for taxes being less than fifteen hundred dollars. They are all in the same neighborhood adjoining the Tennessee line.

Affiant further states that in May, 1901, after this defendant had been operating about eight years, and at or about the time the Tennessee Copper Company began its open-heap roasting operations, a committee of disinterested citizens was requested to go upon the lands of the above-named persons and investigate and make report of what injury, if any, had resulted to the same from the fumes, and they reported that there was no injury.

Affiant further states that the averment in paragraph nineteen of the complainant's bill to the effect that the defendant Ducktown Sulphur, Copper & Iron Company abandoned open-heap roasting shortly after complaint was made to the legislatude of Georgia is an error. It appears that the resolution of said body as set out in said bill was adopted August 17th, 1903, whereas said defendant had abandoned open-heap roasting in August, 1902. Nor is it true as to this defendant, as might be inferred from paragraph twenty of said bill, that in adopting the new process of smelting any new or different furnaces, kilns, or other appliances, have been

erected. Nor is it true as to this defendant, as might be implied from paragraph twenty-three of said bill, that as a part of the appliances used with said new process the defendant has erected and is using tall chimneys or stacks, two or three hundred feet high, whereby it is claimed that said fumes are thrown off at a high altitude and thereby diffused and extended over a much larger area than was the case when open-heap roasting was practiced, even if this conclusion be sound. On the contrary, this defendant is using only the ordinary blast furnaces with common tubular iron smoke-stacks about sixty feet high, the same as were used in smelting roasted ore. Again, this defendant's smelting plant is located in a hollow or ravine below the mean level of the region, and the same is practically surrounded by near-by hills and ridges that are much higher than the tops of said stacks. While it is doubtless true that the fumes at the point of exit from the stacks are stronger than those coming from a like area in the open-heap roast-plant, it is equally true that when they have been diffused and scattered over an area equal to that of said roast-plant they are no stronger than those arising from such roast-plant.

The only hurtful component of the alleged poisonous and noxious fumes is sulphurous acid gas. It is true that if this be precipitated by moisture before the fumes become sufficiently diluted or scattered it proves more or less injurious to most forms of vegetation in the neighborhood of the works; but affiant denies that the fumes arising from the defendant's works are sufficient in quantity or quality to cause the alleged wrongs and injuries to the State of Georgia as complained of in the bill. It is also denied that the fumes from the works of

either or both the defendants have killed all vegetables, crops, grasses, timber, etc., to the value of hundreds of thousands of dollars over a considerable portion of the counties of Fannin, Gilmer, Murray, Towns and Union, and that the zone of destruction is growing under each month of operation of said works, and that the injury extends for a distance of fifty miles therefrom. On the contrary whatever of injury may have resulted from all the fumes arising from said works has been confined to a small portion of Fannin county contiguous to the mining region, and even such injury has been greatly exaggerated. It is neither of the character or extent to affect in the slightest degree whatever of rights the complainant may have in its public roads, or in the rainfall of the region, or under its taxing power. Affiant denies that even in said portion of Fannin county all vegetation has been killed and the soil denuded and rendered barren and sterile, thereby causing freshets, floods and overflows; and thereby causing the barren, sterile soil to be washed down and deposited upon the richer bottom lands below; and thereby causing the highways to be washed into ruts, holes and gullies.

Affiant says that most of the timber for many miles around the works is, or recently was, young or second growth, the original forest having been cut away prior to the suspension of operations in 1879 and used as cordwood in roasting and for making charcoal for use in smelting operations. The greater part of this young gowth has been bought and used by the defendants in their roasting operations. As a matter of fact, therefore, the region is practically barren of timber for many miles around the mines; but even here, except immediately

around the works, the wild or native grasses grow far more luxuriantly than they do elsewhere in the timber in the region beyond the reach of the smoke.

Neither is it true that other vegetation in said region is injured to the extent charged. Some kinds of tender vegetation are injured when conditions favor it, while others are not appreciably affected, except in the immediate neighborhood of the works. On lands in Tennessee adjoining Fannin county in the neighborhood complained of as good crops have been grown during the past several years as were grown before this defendant began its operations. Some of said lands lie within less than one mile of the Tennessee Copper Company's smelting plant and within a shorter distance of the old Pittsburgh & Tennessee Copper Company's roast-plant. The wild or native grasses which have sprung up all over said region afford an abundance of the finest pasturage for horses, cattle, sheep, etc. Instead of being injured or killed, except immediately around the works, they grow in such luxuriant abundance as, in affiant's opinion, to afford as good if not better means of retaining the soil and moisture than the young growth timber ever did.

Affiant further states that the charge that said fumes, in the form and quantity in which they come from the defendant's works, are poisonous, noxious and unwholesome is not sustained by the facts. On the contrary, they are generally regarded as being not only destructive of disease-breeding germs and malaria, but as having decided therapeutic value in many morbid conditions, notably those of the air-passages, such as asthma, catarrh, and even in tuberculosis. Many thousands of people live in said mining region, and even to those who for many years worked among the heaps in roasting the ores where

entrated form, no
the fumes were in their most conce ose suffering from
harm resulted. On the contrary, thos d.
catarrh claimed to have been benefitted. ge that said fumes

Affiant further states that the charg e atmosphere is as
shut out the sunlight and darken the ordinary manufac
true of the smoke arising from any on fact, it is not as
turing plant of like proportions. In smoke arising from
dark, nor apparently as thick, as the sm an ordinary manu-
the combustion of bituminous coal in a aps on an average
facturing plant. Occasionally, perha gs and vapors from
of once a month, it, along with the fogs gion and the many
the many mountain streams of the regi settle down during
steam engines of the defendants, will se , it rises and is dis-
the early morning hours; but, like fog, he so-called smoke,
sipated by the morning sun. In fact, th ore the appearance
which thus occasionally settles, has mor it can be likened to.
of an ordinary fog than anything else it side from the ques-
The smoke conditions in many cities, as is bad, if not worse.
tion of injury to the vegetation, are as l , the dense, black,
than those at Ducktown. In short, smoke are absent,
irrespirable qualities of ordinary coal s as contained in the
and the quantity of sulphurous acid ga m, or even discom-
fumes is not sufficient to produce harm
fort under ordinary circumstances.

Affiant further states that while th the copper ores at
Ducktown are practically inexhaustible le in quantity, they
are of such low grade in copper conte tents as to make it
commercially impossible to ship them m elsewhere for
treatment; but even if this were poss ssible, there is no
district within reasonable distance that at is as well-suited
in every way for this purpose as that at where they are
found. It is remote from the agricult tural districts and
is naturally incapable of sustaining a any but a sparsely

settled rural population. While in 1890 Ducktown had a population of only about 200, the resumption of operations in 1891 caused a marked growth; and since the Tennessee Copper Company came into the field there has been a large influx of population, it now being conservatively estimated at from eight to ten thousand people, who are directly dependent upon the working of the mines. Counting those who are indirectly dependent, it is estimated by some that the population is from ten to twelve thousand. Large sums of money have been invested by these people in homes, in business and in other ways, while these defendants alone pay taxes upon an assessment much greater than the total tax-aggregate of the entire county was for many years before mining operations were resumed.

Affiant further states that for more than two years past no complaints have been filed against this defendant, either by citizens of Georgia or of Tennessee, on account of the alleged injuries from the fumes arising from its said operations, nor have any claims of this nature been settled by compromise out of court. And affiant is informed and believes that a large majority of the people of Georgia, who live in the affected area adjacent to the mines and who for that reason are directly interested, are opposed to the effort being made to enjoin said operations. Affiant has not heard of one who favors it.

And further this deponent saith not.

W. H. FREELAND,

Sworn to and subscribed before me,
this 13th day of November, 1905.

G. G. HYATT,
Notary Public.

(SEAL)

EXHIBIT C.

Affidavit of J. M. Center.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1905.

STATE OF GEORGIA,
BY ITS ATTORNEY GENERAL, JOHN C. HART,
Plaintiff,
vs.
THE TENNESSEE COPPER COMPANY AND THE DUCKTOWN SULPHUR, COPPER & IRON COMPANY, LIMITED,
Defendants.

No. 13 ORIGINAL.

STATE OF TENNESSEE,
POLK COUNTY.

Personally appeared before me G. G. Hyatt, a notary public in and for said county, J. M. Center, who, being first duly sworn according to law, deposes and says:

That he is 51 years of age, and has lived in Ducktown all his life, except a few years during the time the copper mines at this place were shut down. Affiant is well acquainted with the copper-mining region, its history and conditions, now and past. It is situated in a remote, mountainous section. It is practically surrounded by tall mountains, some of them reaching 4,300 feet above sea-level. It is broken by large hills and ridges. The soil generally is very poor. The few level areas are small strips along the streams. The soil of the uplands is, as

a rule, wholly unfit for cultivation. The timber for many miles around the mines was cut off years ago for use in roasting and smelting. The young growth that followed has practically all been used by the present mining companies.

The Ducktown Sulphur, Copper & Iron Company commenced operations in 1891. Nearly two years were spent in making various tests and experiments with the view of finding some way of utilizing the iron and sulphur in the ores. The only way the ores had ever been treated before was by open-heap roasting before smelting them. After a thorough trial, all said experiments and tests failed, and the company had to fall back to the only method that had ever proved successful.

The company in 1893 located its roast-plant at Cartertown, which is about a mile nearer the Georgia state line than its smelters. It roasted its ores here until about August, 1902, when a new method, discovered by its general manager, Mr. Freeland, was adopted. Since that time all the reduction operations of this company have been carried on at its Isabella smelter, which is about three miles from the nearest point on Georgia line.

About 1900 the Tennessee Copper Company came here, and in 1901 began roasting and smelting. The largest of its roast-plants was located at Burra-Burra, another at the Polk county mine, and another about half-way between, while its smelting plant was and is yet located near McCays. It ceased roasting in 1904.

Up to the time the Ducktown Company ceased open-heap roasting in 1902, only five persons owning land in Georgia has filed complaints against it. Since then no complaint has been filed against said company by any

resident or land-owner of Georgia. The five persons above mentioned were J. A. Fortner, T. M. Ross, Jr., W. P. Ledford and W. M. and M. A. Madison. Affiant was acquainted with their lands then, and both before and since, and says that there was no injury to them at that time from the fumes. Affiant was in and through that neighborhood frequently about that time and took special pains to notice the conditions, because he had learned that some of these parties were claiming to be injured. It was a mile or further this side and toward the mines that the slightest sign of the smoke was noticeable at all, and that was only a barely noticeable stain on a few tender leaves. And it was nearly a mile still further this way before the evidence of injury were plain to be seen.

Affiant states that he is also familiar with the small area of injury in Georgia, which is alleged to have occurred since the Tennessee Copper Company began its operations. The injury here is greatly exaggerated. It is not true that it has spread over portions of five counties, destroying all vegetables, grasses, crops, etc. It is confined to a very small portion of Fannin county, adjacent to the works. As already stated, the timber for many miles around has been cut away, thus giving the region a somewhat barren appearance; but even here, except close to the works, the native grasses grow in luxuriant profusion. A mile or two away, where there is any timber, it is more or less injured, but from three to five miles there is little or no injury. As good crops as were ever grown on the lands have been grown during the past several years on places a half to three-quarters of a mile from the Tennessee Copper Company's smelter.

Affiant further says that the charge that said fumes are unhealthful and unwholesome is erroneous. He is and heretofore has been well acquainted with many men who worked for years among the roast piles, where said fumes occur in the most condensed form, and he never knew of their hurting anyone, or ever heard such a suggestion until recently. Affiant himself at one time worked for a long period in the fumes near the roast piles and never suffered any ill-effects. On the other hand, he has known of bad cases of catarrh and other ailments of the kind to be cured while those having them worked in the fumes.

Neither is it true that said fumes shut out the sunlight and darken the atmosphere. It is true that occasionally—perhaps on an average of once a month—the fogs and vapors that come from the many streams of the region settle down in the early hours of the morning. Whatever of smoke there may be in the air settles with them, but, like an ordinary fog, it begins to lift after the sun rises. Aside from the fact that these fogs sometimes carry the odor of the fumes, they could not be distinguished from ordinary fogs. And aside from this, the smoke of many cities, where bituminous coal is used, is as bad or worse than these fogs. The fumes, as they come from the furnace stacks, are not as black, or any larger in volume, than the smoke of an ordinary manufactory using soft coal.

Affiant is well-acquainted with the people living in said affected area and, from having talked with many of them, he believes they are almost unanimously opposed to the effort being made by their state to shut the mines down. He has not heard of anyone who favors it. Some

want compensation. Others do not even ask that, feeling that they have been fully compensated by the increased prosperity.

Further this deponent saith not.

J. M. CENTER.

Sworn to and subscribed before me,
this 11th day of November, 1905.

G. G. HYATT,
Notary Public.

(SEAL)

EXHIBIT E.

Affidavit of D. M. Stuart.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1905.

STATE OF GEORGIA,
BY ITS ATTORNEY GENERAL, JOHN C. HART,
Plaintiff,
vs.
THE TENNESSEE COPPER COMPANY AND THE DUCKTOWN SULPHUR, COPPER & IRON COMPANY, LIMITED,
Defendants.

No. 13 ORIGINAL. IN EQUITY.

STATE OF TENNESSEE,
POLK COUNTY.

Personally appeared before me the undersigned, a notary public in and for Polk County, Tennessee, D. M. Stuart, who being first duly sworn herein on his oath says:

That he is 68 years of age and has been a resident of Ducktown and vicinity nearly all his life; that he is well acquainted with the copper mining region, its history and conditions, both past and present; that it is located in a mountainous section whose mining interests are vastly paramount to all others combined, affording as they do employment and sustenance to at least nine-tenths of the people.

That from 1893 until August, 1902, the Ducktown Sulphur, Copper & Iron Company, Limited, carried on

its open-heap roasting operations at a place locally known as Cartertown, which is about a mile nearer to the Georgia state line than its smelting works, and that since abandoning said roasting process, its reduction operations have been carried on altogether at said smelting works.

That affiant owns a tract of land in the edge of North Carolina about three miles from said smelting works, but much nearer Cartertown. While said roasting operations were being carried on some injury resulted from the fumes arising therefrom to affiant's timber, orchards, etc., but since said company began reducing its ores altogether at its said smelting works no injury to affiant's said lands, timber, orchards, or crops, has resulted from the fumes coming from said smelting plant.

D. M. STUART.

Sworn to and subscribed before me,
this the 13th day of November, 1905.

G. G. HYATT,
Notary Public.

(SEAL)

EXHIBIT F.

Affidavit of M. T. Fouts.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1905.

STATE OF GEORGIA,
BY ITS ATTORNEY GENERAL, JOHN C. HART,
Plaintiff,

vs.

THE TENNESSEE COPPER COMPANY AND THE DUCKTOWN SULPHUR, COPPER & IRON COMPANY, LIMITED,
Defendants.

No. 13 ORIGINAL.

STATE OF TENNESSEE,
POLK COUNTY.

Personally appeared before me, John S. Shamblin, a notary public in and for said county, M. T. Fouts, who, being first duly sworn according to law, deposes and says:

That he is 58 years of age and has been a resident of Polk County almost all his life; that in May, 1901, he, in company with G. C. Parks and B. P. Rollins, visited the copper region at Ducktown for the purpose of examining into and reporting upon alleged injuries from the sulphur fumes. We spent the 29th and 30th of May, and the first of June, 1901, in making said round of inspection.

We first went to McCays, which is at the Georgia line,

about three and a half miles from the smelting plant of the Ducktown Sulphur, Copper & Iron Company, and about half a mile from that of the Tennessee Copper Company. At that time the open-heap roasting operations of the former company were being carried on at Cartertown, which is about a mile nearer to the Georgia line than its smelting plant.

In the vicinity of McCays the timber had nearly all been cut away, but what little remained was apparently unhurt. The crops on McCay's farm also appeared to be uninjured.

We then went up Ocoee river by the way of the mouth of Wolf creek and inspected the lands of John A. Fortner, T. M. Ross, Jr., W. P. Ledford, Mrs. M. A. and W. M. Madison. The conditions on all were substantially the same. The original forest appeared to have been cut away years before. We were informed that it had been used in roasting and smelting operations before the suspension in 1879. The land was very poor and the young growth that had sprung up was scrubby. It was green and uninjured. We found some dead saplings, however, such as is usual in such thick timber; but there was no sign of the smoke on it or the foliage, or anything to indicate that it had been killed by the fumes. We also examined the crops—such as they were—and the orchards. We did not go inside, but examined them sufficiently to satisfy ourselves that there was no injury. We found one or two dead fruit trees, but the others were green and thrifty. Said lands all lie in Georgia near the Tennessee line, except those of W. M. Madison, part of which lie in both states. We considered that at that time they were beyond the affected area.

At that time the Ducktown Sulphur, Copper & Iron Company had been carrying on its operations for eight years or longer. Its roast heaps were about a mile nearer the Georgia line than its present works. At that time the above-named parties were the only land owners in Georgia who had filed complaints against said company. And affiant is informed and believes that since said company abandoned open-heap roasting about August, 1902, no other citizen or land-owner of Georgia has filed any complaint against said company.

Affiant further states that he is familiar with said mining region, its soil, timber, etc. It is a remote, mountainous region, which is not suited for ordinary farming purposes. The soil is rocky, thin and sterile. Only small areas lying along the streams are adapted to farming, and these are not very fertile. The hill and ridge lands, as a rule, would not repay the expense of clearing and fencing. There are but five or six places in the region that are regarded as capable of producing sufficient crops to carry their owners through the winter.

The timber for many miles in every direction from the mines was cut off years ago. The greater part of the young growth that sprung up in its place has also been cut and used in the present mining operations. Where this young growth has been cut, the wild or native grasses have sprung up, making fine pasturage for cattle, horses, etc.

The alleged injuries from said fumes have been greatly exaggerated. There is little timber of any value within the affected area. As good gardens and crops as the land is capable of producing are grown but a short distance from the works. The effects of the fumes on this

timber seem to be more permanent than on crops, but it requires from two to four years to kill a tree. Vegetation sometimes appearing to be badly injured is not so in fact, but will put out again and grow on to maturity.

Affiant further states that a considerable part of the injury to timber attributed to the smoke is, in his opinion, due to worms and insects. Some time since affiant made a trip through the timber regions of the Cumberland mountains, sixty to seventy miles from Ducktown, and found the same conditions there that exists in some districts where it is claimed that injury to timber has resulted from sulphur fumes. For many years past large quantities of some species of timber have been dying in the forests of this part of East Tennessee. It is true that for some few miles from the copper works at Ducktown there is more or less injury to timber. That immediately around the works, if it had not been cut, would probably have been killed. What little there is left within a distance of one to three miles is more or less injured, but at a distance of from three to five miles there is little, if any, injury. And in that part of the region most subject to the fumes the greater part of the land belongs to the companies and to people who have realized more from the sale of the timber than the land itself was worth before operations were resumed at the mines, and most of whom, therefore, are satisfied.

From affidavit's knowledge of the comparatively trifling injury in the small area of Fannin County, Georgia contiguous to the mines, and from talking with some of the people, he believes that most, if not all, of the residents of said district, who are directly interested in the matter, are opposed to the effort being made by the

state to shut down the mines. He has heard of none who favor it.

Further this deponent saith not.

M. T. FOUTS.

Sworn to and subscribed before me,
this 13th day of November, 1905.

JOHN S. SHAMBLIN,
Notary Public.

(SEAL)

EXHIBIT G.

Affidavit of B. P. Rollins.

IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1905.

STATE OF GEORGIA,
BY ITS ATTORNEY GENERAL, JOHN C. HART,
Plaintiff,

vs.

THE TENNESSEE COPPER COMPANY AND THE DUCKTOWN SULPHUR, COPPER & IRON COMPANY, LIMITED,
Defendants.

No. 13 ORIGINAL.

STATE OF TENNESSEE,
BRADLEY COUNTY.

Personally appeared before me John K. Randolph, a notary public in and for said county, B. P. Rollins, who, being first duly sworn according to law, deposes and says:

That he is 60 years of age and has been a resident of Polk County all his life; that in May, 1901, he and George C. Parks, chairman of the County Court of Polk County, and Hon. M. T. Fouts, ex-statate senator from Polk County, were appointed as a committee to visit the Ducktown mining region to make a personal inspection and examination into conditions existing there for the purpose of ascertaining and reporting what injury, if any, had resulted from the sulphur fumes arising from

the works of the Ducktown Sulphur, Copper & Iron Company, Limited. Accordingly, on the 29th and 30th of May, and the 1st of June, 1901, we made a careful examination and inspection of certain lands and of the general situation, each making written memoranda of what he learned or observed.

We first went from the smelting plant of the Ducktown Company to McCays Station on the Atlanta, Knoxville & Northern Railway, now the L. & N. Railway. This village is partly in Tennessee and partly in Georgia and is about three and a half miles from said smelting works. We found no sign of injury here. The old timber had been cut away and the young growth was green and unhurt. From here we went southwardly up the Ocoee river to the mouth of Wolf Creek, thence to John A. Fortner's, whose lands we had been requested to inspect. They are in Fannin County, Georgia. Here there was more timber than at McCay's. I saw a few dead saplings, but no more than would ordinarily be found among like timber elsewhere. There was no sign of injury on the foliage. I paid special attention to Fortner's orchard, because I had heard it said that smoke would injure fruit trees more quickly than others. There was no sign of injury to it. It looked fresh and green. We also regarded this place as being beyond the limit of injury from the smoke.

We next went to the place of T. M. Ross, Jr., which is about half mile from Fortner's in the direction of the mines. Here we also found a small percentage of dead young growth, but not more than is usually found in such timber. I paid special attention to the orchard also. It was unhurt, being fresh and green. We did not go

through his crops, but rode along outside the fences, and examined them. There was no sign of injury from the fumes.

We next went to W. P. Ledford's, which is also in Fannin County. Here we found practically the same conditions as at the other places. The original forest had been cut off years before. Of the young growth, there was perhaps ten per cent. dead—about what is commonly found in such thick young growth. We saw no sign of the fumes on the foliage, nor any timber in process of being killed. The crops were green and unhurt.

We next visited the places of W. M. and M. A. Madison, which adjoin. The former lies partly in Tennessee and partly in Georgia and are closer to the mines than the other places above mentioned. Here, as on the other places, we found that nearly all the old timber had been cut away years before. W. M. Madison had a small scope left on the mountain side. The young growth was very poor and scrubby, but mostly green and unhurt. We thought that possibly there was a little more of it dead than we found at other places, but that was probably due to the fact that the soil here was especially poor and rocky. There was nothing to indicate that it was due to the smoke. There was no sign of injury from the fumes on the timber, such as is plainly apparent where injury has occurred. I saw one dead tree in W. M. Madison's orchard, but there was nothing in the surroundings to show that the smoke had killed it. The rest of the trees in his orchard, as well as those in the orchard of Mrs. M. A. Madison, were thrifty and green. The crops, such as they were, were unhurt.

Affiant further states that the examination of said

lands was made about, or shortly after the time the Tennessee Copper Company began its open-heap roasting operations and after the Ducktown Company had been operating about eight years. At that time the roast-piant of the latter company was at a place called Cartertown, being about a mile nearer the Georgia lines than the smelting-plant, where all of the operations of the said company are at present carried on. And affiant is informed and believes that since said company abandoned its said roasting operations no resident nor owner of land in Georgia has filed any complaint against said company on account of injury from the fumes arising from its said smelting-plant; and affiant believes he would have known of it if any such complaint had been filed. Affiant further states that prior to the time said company quit said roasting operations the above-named parties are the only ones owning land in Georgia who had complained against said company on account of the fumes coming from said roasting operations.

Affiant further states that the mining section is located in a remote mountain region, the soil of which is naturally very thin and poor and almost wholly unfit for farming purposes. There is little or no timber, except young or second growth and the greater part of this has been used by the companies in their roasting operations.

Affiant further states that for many years past large quantities of timber have been dying throughout this section of East Tennessee, even beyond the reach of the smoke. Perhaps one year it will be chestnut; next, the whiteoak and postoak. It is attributed to borers or worms. They also kill fruit trees, whole orchards sometimes being ruined, if the worms be not killed. Affiant

states that he has given this matter some attention, and it is his opinion that a considerable part of the injury that is attributed to the fumes is really due to these borers.

Affiant further states that the injury from said fumes has been greatly exaggerated. At the time said inspection was made in 1901 the affected zone had not spread into Georgia; or, if it had, affiant was unable to discover it after a careful examination of the few tracts of land said to be affected. Since then some injury has resulted to lands lying in that part of Fannin County contiguous to the mines. Most injury there is has been confined mainly to the timber, most of which is scrubby young growth. As already stated the young growth has been cut off for quite a distance from the works. Affiant does not believe from what he has seen of the conditions that the cutting away of the timber, and the comparatively small amount that has been killed or injured, are sufficient to appreciably affect the rainfall, so as to cause freshets and overflows, washing out and injuring the public roads, and depositing the barren soil on the richer bottom lands below. And where said timber has been cut away, except within a few hundred yards of the plant, the wild grasses grow in great abundance, furnishing fine pasturage for cattle.

Affiant further states that the mining interests of said territory are vastly paramount to all others combined. Where, during the period of suspension of mining operations from about 1879 to 1891, a few people eked out a scanty living, patiently waiting for the reopening of the mines, there is now a large and thrifty population, conservatively estimated at from eight to ten thousand, nearly all of whom are directly dependent upon the work-

ing of the mines. Affiant also believes from having talked with some of them that the majority of those who claim to have been more or less injured, do not desire the mines shut down, but simply want compensation. The closing of the mines would seriously injure them as well as many others benefitted by the operations.

Further this deponent saith not.

B. P. ROLLINS.

Sworn to and subscribed before me,
this 10th day of November, 1905.

JOHN K. RANDOLPH,
Notary Public.

(SEAL)

EXHIBIT H.

Affidavit of George C. Parks.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1905.

THE STATE OF GEORGIA,
BY ITS ATTORNEY GENERAL, JOHN C. HART,
Plaintiff,

vs.

THE TENNESSEE COPPER COMPANY AND THE DUCKTOWN SULPHUR, COPPER & IRON COMPANY, LIMITED,
Defendants.

No. 13 ORIGINAL.

STATE OF TENNESSEE,
POLK COUNTY.

Personally appeared before me, James A. Kimsey, a notary public in and for said county, George C. Parks, who, being duly sworn according to law, deposes and says:

That he is 53 years of age, a resident of Polk County, and Chairman of the County Court of said county.

That in May, 1901, he and B. P. Rollins and M. T. Fouts visited the Ducktown mining region for the purposes of ascertaining and reporting what injury, if any, had resulted to certain lands from the fumes arising from the works of the Ducktown Sulphur, Copper & Iron Company, Limited. At that time said company was roasting its ores in open heaps at a place called Carter-

town, which is about one mile nearer the Georgia state line than the smelting plant of said company. About August, 1902, said roasting process was abandoned by this company and it has since carried on its reduction operations altogether at its smelting plant at Isabella, which is about three miles from said state line.

We first went from Isabella to McCays, a village on the A. K. & N. Ry., (now the L. & N. Ry.), and which is on the state line and about three and a half miles from said smelting works. Around in this vicinity the timber had nearly all been cut away, but that still standing appeared to be uninjured. From here we went up the Ocoee river to the mouth of Wolf Creek, which is in Georgia; thence to John A. Fortner's, T. M. Ross', W. P. Ledford's, M. A. and W. M. Madison's. At that time the Ducktown Sulphur, Copper & Iron Company had been in operation on a large scale eight years or longer. The lands of the above-named persons lie immediately across the state line about two and a half miles from the Cartertown roast plant and about three and a half miles from the smelting works. A part of the lands of W. M. Madison lie on the Tennessee side.

We carefully examined and inspected said lands and the region in which they are situated. We found that the original forest had practically all been cut away years before for cord-wood and charcoal for use in former mining operations. A second or young growth had sprung up. It was mostly small and scrubby, but green and uninjured. We found some dead saplings, but no more than is usually found in such timber. We also examined the orchards and crops. On account of the poverty of the land the crops were sorry, but uninjured.

Likewise, the orchards were green and uninjured. In one or two instances we saw a dead fruit tree or two, but no more than is common everywhere. It was our judgment that at that time these lands were beyond the smoke limit.

Affiant further states that at the time he made said inspection, the above-named parties were the only land owners in Georgia who had filed complaints against the Ducktown Sulphur, Copper & Iron Company. And he is informed and believes that since said company abandoned its roast-plant at Cartertown in August, 1902, no complaint has been filed by any land-owner in Georgia, and affiant believes he would have known of it, if any such complaint had been filed.

Affiant further states that prior to the suspension of operations in 1879 he at one time lived in Ducktown for about eighteen months; and since that time has lived in said county, within twelve miles of the mines. He is familiar with the region, its soil, timber and general conditions. The mining region is commonly known as the "Great Copper Basin," being almost surrounded by high mountains. The intervening territory is eight or ten miles, or further, across and is traversed by high ridges and hills. There is no level land except here and there in strips along the streams. The hill land, as a rule, is steep and very poor. In the whole region there are not more than four or five farms that are capable of yielding sufficient crops to carry their owners from one season to another. The timber, as might be expected on such land, does not amount to a great deal. For a distance of several miles around the mines it was mostly young growth when operations were resumed, and nearly all this has

been cut and delivered to the companies for roasting operations. Affiant knows of no locality that is better suited for the treatment of the ores than this. It is remote, not thickly settled, and the mining companies themselves own a considerable part of it. Affiant states that the injuries alleged to result to timber, crops, etc., from said fumes are greatly exaggerated. As already stated, the timber for several miles around the works has been cut and used in the operations, thus giving the region a barren appearance. But here, except possibly within a few hundred yards of the works, the native grasses grow more luxuriantly than any place affiant has ever seen east of the Mississippi river, furnishing sufficient grazing for thousands of cattle from April until October. As good crops as the land is capable of producing have been raised during the past several years on lands within less than a mile of the plant of the Tennessee Copper Company.

Affiant further states that when operations were suspended in 1879, nearly all the people were forced to move elsewhere for employment. The population dwindled to comparatively nothing. Lands, houses and other property had little value. Lands that will now sell for from two to three dollars per acre could be bought for 25 and 50 cents per acre. There was no market for farm or garden products. A day's work could hardly be had at fifty cents. Now there is a population estimated at from eight to ten thousand. Labor is well employed. All kinds of farm and garden products find a ready sale, thus giving the farmers for thirty miles around a good market.

Affiant further states that the charge that said fumes are injurious to health is not borne out by experience.

Affiant himself has worked among them and has known of others who for years worked where they were thickest and strongest; yet he has never observed any ill-effect therefrom, and never even heard that they were injurious until recently. The charge that they darken the sun and shut out the sunlight is also erroneous. It is true that when ordinary fogs settle, more or less of this smoke will settle with them. This usually occurs during the early morning hours, but along up in the morning they rise and are scattered by the sun. It is not true that they are always present. Sometimes for weeks at a time the smoke does not settle at all.

Affiant further states that from his personal knowledge of the conditions in the small affected area in Fannin County, Georgia, there has not been sufficient injury to vegetation to cause the rainfall to run off too rapidly, thus washing away or injuring the roads, washing away the soil, etc. If so, it would seem reasonable that such results would have followed the cutting off of a much larger area of timber than has been killed by the fumes. Affiant is further satisfied from having talked with some of them, that the great majority of the people in said affected area, and who are directly interested, are opposed to the shutting down of the mines.

Further this deponent saith not.

G. C. PARKS.

Sworn to and subscribed before me,
this 16th day of November, 1905.

JAMES A. KIMSEY,
Notary Public.

(SEAL)